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No. 84-638

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROY L. PRICE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases—Continued:

Statutes:

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Petitioner challenges the sufficiency of the evidence to support his conviction for bank larceny, in violation of 18 U.S.C. 2113(b).

1. Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on one count of conspiracy to make and use false material statements to obtain bank loans, in violation of 18 U.S.C. 371 (Count One); one count of making a materially false statement for the purpose of renewing a loan, in violation of 18 U.S.C. 1014 and 2 (Count Two); one count of making a false statement in connection with the disclosure of collateral to the Federal Deposit Insurance Corporation, in violation of 18 U.S.C. 1001 (Count Three); and one count of bank larceny, in violation of 18 U.S.C. 2113(b) (Count Four). He received concurrent sentences of 18 months' imprisonment on each of the four counts. The court of

appeals unanimously affirmed the conviction for bank larceny and vacated the judgments of conviction on the other three counts in accordance with its practice when not reviewing convictions involving concurrent sentences (Pet. App. A1-A12).

The evidence adduced at trial, as recounted in the court of appeals' opinion, established that petitioner, an attorney, became involved in a real estate development project in 1978. In order to acquire collateral for this venture, petitioner and other principals in the project obtained a loan in the amount of $300,000 from the Commercial Bank & Trust Company (CB&T). At the same time, petitioner obtained a $100,000 personal loan from CB&T. As security for the $100,000 loan, petitioner and his wife executed a collateral mortgage note in that amount, and, to secure the note, a collateral mortgage. The property that petitioner mortgaged was his law office, on which the National Bank of Commerce in Jefferson already held an $85,000 first mortgage. This property was appraised at $175,000. Pet. App. A2-A4.

On March 7, 1980, petitioner removed the $100,000 collateral mortgage note from CB&T by executing a trust receipt.[1] At that time, petitioner was negotiating to obtain a

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[1]Printed on the trust receipt was the following (Pet. App. A4):

> It is expressly agreed that the delivery of the withdrawn securities is being temporarily made to the undersigned for convenience only, without novation of the original debt, or giving the undersigned any title to the withdrawn securities, and the undersigned is/are given possession thereof solely as trustee/trustees for said Bank, and as such to receive the avails thereof for said Bank.
>
> It is further stipulated that the undersigned shall not, under any circumstances whatsoever, use, sell, or repledge the withdrawn securities, or any of them, withdrawn under the terms of this TRUST RECEIPT, nor use, sell or repledge the cash, stocks, bonds or other property, or any part thereof, received therefor, for any purpose than that of paying the indebtedness for the security of which the said withdrawn securities are pledged to said Bank.

$100,000 loan from the National Bank of Commerce in Jefferson (NBC). As a condition of making the loan the bank demanded a $100,000 first mortgage on petitioner's law office. Petitioner agreed, and on March 14, 1980, NBC loaned him $100,000. Petitioner cancelled CB&T's $100,000 collateral mortgage note as well as NBC's prior $85,000 collateral mortgage note, with the result that NBC's $100,000 mortgage became the first and only mortgage on his law office. Pet. App. A4-A5.

Petitioner used the $100,000 loan from NBC to pay off or consolidate loans at NBC totalling about $70,000, including the balance on the original $85,000 first mortgage on his law office. The remaining money, about $30,000, was paid to CB&T, but was not applied to the $100,000 loan. Thus, the loan remained outstanding, but, as a result of petitioner's cancellation of the mortgage, CB&T no longer held any collateral securing the loan. Pet. App. A5.

2. After he was convicted by the jury on the bank larceny charge, petitioner filed an unsuccessful motion for judgment of acquittal contending that the evidence was insufficient to establish a violation of 18 U.S.C. 2113(b) (Pet. App. A5).

The court of appeals affirmed the bank larceny conviction. It held that petitioner's taking and cancelling the $100,000 mortgage note "is properly characterized as 'stealing' within the meaning of subsection 2113(b)" (Pet. App. A7). The court of appeals declined to review petitioner's other convictions because the sentences on those counts were concurrent with the sentence on the bank larceny conviction (*id.* at A11).

3. Petitioner claims (Pet. 22-23) that his conviction for bank larceny in violation of 18 U.S.C. 2113(b) is improper because his conduct did not involve the taking and carrying

away of property in the control of the bank.[2] This argument is meritless. This Court's decision in *Bell* v. *United States*, No. 82-5119 (June 13, 1983), confirms that Section 2113(b) applies to petitioner's conduct.

The Court held in *Bell* that 18 U.S.C. 2113(b) is not limited to the crime of common-law larceny, but also proscribes the crime of obtaining money under false pretenses (slip op. 5, 6). As the court of appeals found (Pet. App. A6-A7), the evidence in this case showed that petitioner obtained the mortgage note from the bank under the pretense that he would comply with terms of the trust receipt. The receipt authorized petitioner to dispose of the note only if he used the proceeds to pay his indebtedness to the bank (see note 1, *supra*.). Petitioner cancelled the mortgage, but did not apply the proceeds to his debt. Thus, as the court of appeals stated, "[t]he jury surely could have found from the evidence that [petitioner] took the collateral mortgage note with the intention of cancelling it and thereby depriving CB&T of its security on a $100,000 loan" (Pet. App. A6). Since petitioner took away a "thing of value" from the bank with "intent to steal," he properly was convicted of violating Section 2113(b).

4. Petitioner also contends (Pet. 9-22) that even though his convictions on the other counts were vacated, this case raises an issue involving the validity of the concurrent sentence doctrine. However, no question regarding the concurrent sentence doctrine is presented in this case.

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[2]Section 2113(b) provides in pertinent part:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years or both * * *.

The concurrent sentence doctrine, as it has been described by this Court, holds that when a defendant receives concurrent sentences for two convictions and one of the convictions is upheld, a court need not review the conviction on the other count because the conviction on one count is sufficient to sustain the sentence. *Hirabayashi* v. *United States*, 320 U.S. 81, 105 (1943). See also *United States* v. *Romano*, 382 U.S. 136, 138 (1965); *Lawn* v. *United States*, 355 U.S. 339, 359 (1958); *Locke* v. *United States*, 11 U.S. (7 Cranch) 339, 344 (1813). The unreviewed conviction therefore is affirmed. See, *e.g.*, *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973). This Court has indicated that affirmance of the unreviewed conviction may not be appropriate if the defendant would suffer adverse consequences as a result of the additional, unreviewed conviction. *Benton* v. *Maryland*, 395 U.S. 784, 790-792 (1969).[3]

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[3]The courts of appeals generally have concluded that the concurrent sentence doctrine may be utilized if the defendant will not suffer adverse collateral consequences as a result of the affirmance of the unreviewed conviction. See *United States* v. *Gordon*, 634 F.2d 639, 643 (1st Cir. 1980); *United States* v. *Lampley*, 573 F.2d 783, 788 (3d Cir. 1978); *United States* v. *Truong Dinh Hung*, 629 F.2d 908, 931 (4th Cir. 1980) (Russell & Hall, JJ. concurring and dissenting), cert. denied, 454 U.S. 1144 (1982); *United States* v. *Mullens*, 583 F.2d 134, 142 (5th Cir. 1978); *United States* v. *Grunsfeld*, 558 F.2d 1231 (6th Cir.), cert. denied, 434 U.S. 872 (1977); *United States* v. *Smith*, 601 F.2d 972, 973 (8th Cir.), cert. denied, 444 U.S. 879 (1979); *United States* v. *Hopkins*, 716 F.2d 739, 749 (10th Cir. 1982); *United States* v. *Johnson*, 700 F.2d 699, 701 (11th Cir. 1983). The Second Circuit has placed the burden on the government to show the absence of adverse collateral consequences. *United States* v. *Vargas*, 615 F.2d 952, 960 (2d Cir. 1980). Under the Seventh Circuit rule, the absence of collateral consequences will be found only in rare situations. *United States* v. *Peters*, 617 F.2d 503, 506 (7th Cir. 1980); *United States* v. *Tanner*, 471 F.2d 128, 140 (7th Cir. 1972).

The Ninth Circuit, the District of Columbia Circuit, and some panels of the Fifth Circuit have refused to apply this rule to affirm convictions because of their view that the task of determining whether a defendant will suffer adverse consequences is too difficult and time consuming to

In this case, the court of appeals applied a variant of the concurrent sentence doctrine under which the unreviewed conviction is vacated, rather than affirmed, in order to "avoid the possibility of adverse consequences" (Pet. App. A11). This case therefore does not present any issue regarding the propriety of the affirmance of an unreviewed conviction under the concurrent sentence doctrine. Moreover, petitioner should not be heard to complain about a rule that provided him with essentially the same relief that he would have received if his challenges to these convictions had been successful on the merits.[4]

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result in any gain in judicial efficiency. *United States* v. *DeBright*, 730 F.2d 1255 (9th Cir. 1984); *United States* v. *Hooper*, 432 F.2d 604 (D.C. Cir. 1970); *United States* v. *Diaz*, 733 F.2d 371, 376 (5th Cir. 1984). The Ninth Circuit has held that the merits of a defendant's claim must be decided in every case; the District of Columbia Circuit and some panels in the Fifth Circuit have adopted the practice of vacating unreviewed convictions.

[4]Petitioner claims (Pet. 15) that he has been prejudiced because there was a "spillover effect" from the vacated convictions to his conviction under Section 2113(b). His only suggestion of such an effect is based on the claim (Pet. 18-19) that a portion of the government's closing argument used testimony relevant to Counts 1 and 2 to attack his defense on the other charges. However, the court of appeals specifically held that these comments provided no basis for a challenge to petitioner's conviction (Pet. App. A8). Petitioner also asserts (Pet. 20-21) that the jury convictions on all four counts may be used against him in disbarment proceedings. His speculation that a decision by the court of appeals addressing the merits of his claims might somehow result in a lesser penalty in the disbarment proceeding does not amount to prejudice, especially since the disciplinary body is likely to be aware of the effect of the vacation of the three convictions by the court of appeals.

Petitioner's argument (Pet. 16-17) that the concurrent sentence doctrine should not apply to clearly invalid convictions also fails to raise an issue warranting review by this Court. First, it seems likely that the court of appeals' decision to vacate the convictions constituted an implicit determination, wholly supported by the facts of this case, that the convictions were not clearly invalid. Second, even if the court below failed to follow prior Fifth Circuit decisions, the result at most is an intra-circuit conflict that does not merit review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
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